

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1512

Service of the within and receipt of a copy thereof is hereby admitted this day of May, A.D. 1977.

RICHARD M. CLOWES, Superintendent of Schools of the County of Los Angeles; HOWARD B. ALVORD, Treasurer and Tax Collector of the County of Los Angeles; LONG BEACH UNIFIED SCHOOL DISTRICT; EL SEGUNDO UNIFIED SCHOOL DISTRICT; BURBANK UNIFIED SCHOOL DISTRICT; BEVERLY HILLS UNIFIED SCHOOL DISTRICT; and SAN MARINO UNIFIED SCHOOL DISTRICT,

Petitioners,

vs.

JOHN SERRANO, JR., *et al.*,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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SUBJECT INDEX

	Page
Question Presented	1
Statement of the Case	2
Argument	4
I.	
Petitioners Lack Standing to Raise Their Federal Due Process Claim	4
II.	
The Legislature and Governor Were Not Indispensable Parties to the Proceedings Below, and No Due Process Rights Were Abridged by Their Exclusion From the Proceedings Below	6
III.	
Petitioners Have Failed to Raise a Federal Question of Importance	9
A. Representation of School Children Below	10
B. Questions Concerning Role of State Courts	12
IV.	
The Decision Below Conflicts With No Decisions of This Court	13
Conclusion	14

ii.

TABLE OF AUTHORITIES CITED

Cases	Page
Baker v. Carr, 369 U.S. 186 (1962)	13
Barrows v. Jackson, 346 U.S. 249 (1953)	5
feller, 322 F. Supp. 678 (S.D. N.Y. 1971)	7
feller, 322 F. Supp. 678 (S.D. N.Y. 1971) ..	8
Dickey v. Robinson, No. 73-430, pet. sum. 42 U.S.L.W. 3205 (October 9, 1973), cert. denied, 414 U.S. 976 (1973)	13
French v. Senate, 146 Cal. 604 (1905)	9
Gates v. Collier, 501 F. 2d 1291 (5th Cir. 1974)	7, 8
Hanson v. Denckla, 357 U.S. 235 (1958)	14
Minnesota State Senate v. Beens, 406 U.S. 187 (1972)	7
Pennoyer v. Neff, 95 U.S. 714 (1877)	14
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	5
Serrano v. Priest, 18 Cal. 3d 728 (1976) (Serrano II)	2, 5, 6, 7, 8, 9, 10, 12, 13, 14
Silver v. Jordan, 241 F.Supp. 576 (S.D. Cal. 1964)	7
Vil. of Arlington Hts. v. Metro. Housing Dev., U.S., 97 S. Ct. 555 (1977)	4
Warth v. Seldin, 422 U.S. 490 (1975)	4, 5
Young, Ex parte, 209 U.S. 123 (1908)	7

iii.

Rules	Page
Rules of the United States Supreme Court, Rule 19	4, 14
Rules of the United States Supreme Court, Rule 19 (a)	4, 13
Statutes	
California Code of Civil Procedure, Sec. 2019(4) ..	9
California Constitution, Art. III, Sec. 3	9, 13
California Education Code, Sec. 33112, formerly Sec. 253	11
United States Constitution, Art. IV, Sec. 4	13

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**Brief in Opposition to Petition for a Writ of Certiorari
to the Supreme Court of the State of California.**

Question Presented.

Whether a California state court judgment which
declared that the state's school financing system violates
the California Constitution abridged the due process
rights of either the Governor and Legislature of Cali-
fornia or school children affected by the decision be-
cause the court refused to join the Governor and the
Legislature as parties in the judicial proceedings leading
to the judgment, where:

- (1) The challenged state court judgment explicitly refrained from issuing any directives to the Governor and the Legislature;
- (2) Neither the Governor nor the Legislature requested that they be joined as parties and are not presently asserting any due process rights, despite their knowledge of the case for the past nine years;
- (3) The constitutionality of the school financing system was vigorously defended in nine years of litigation; and
- (4) The outcome of the case could not possibly have been altered by the intervention of the Legislature and Governor.

Statement of the Case.

On December 30, 1976, following nine years of litigation, the California Supreme Court ruled that the state's public school financing system violates the equal protection provisions of the California Constitution. *Serrano v. Priest*, 18 Cal. 3d 728 (1976), Petitioners' Appendix, at p. 1 (hereafter *Serrano II*). The court held that the system impermissibly conditions the availability of educational opportunity for each student on the property wealth of the school district in which he or she resides. In its decision, the state Supreme Court affirmed a trial court judgment granting declaratory relief, allowing the financing system to remain in operation for a reasonable period of time, and maintaining jurisdiction over the case until the system is brought into constitutional compliance. •

Respondents will not challenge most of petitioners' Statement of the Case. However, respondents do seek

to clarify one of petitioners' statements regarding the holdings of the courts below. Petitioners state that the trial court "purports by its enforceable declaratory relief judgment to specify powers and duties of the legislature and governor with respect to enacting into law a constitutional school financing system." Petition, at p. 9.

In fact, in no part of the trial court judgment is there an order for the Legislature or the Governor to take any action. While the trial court quite properly may have envisioned that the Legislature and Governor would do everything possible to bring the school financing system into constitutional compliance, the court stated, "[T]his Judgment is not intended to require, and is not to be construed as requiring, the adoption of any particular plan or system for financing the public elementary and secondary schools of the state, but only that whatever plan or system for financing the public elementary and secondary schools that may be adopted must be one that will fully comply with the equal-protection-of-the-laws provisions of the California Constitution . . ." Judgment of the Trial Court, reproduced in Petitioners' Appendix, at p. 288.

ARGUMENT.

The Petition herein raises no federal question worthy of this Court's attention. In an attempt to attack a state court decision based solely on state constitutional grounds, petitioners have manufactured the asserted federal due process right of a state governor and legislature to be heard in all cases in which the constitutionality of a statute has been challenged. As will be shown, petitioners lack standing to raise such an argument which, in any case, is totally devoid of merit. In addition, the petition fails to state a valid reason, pursuant to Supreme Court Rule 19, why this Court should grant the discretionary Writ of Certiorari.¹

I.

Petitioners Lack Standing to Raise Their Federal Due Process Claim.

Petitioners do not have standing to argue the asserted due process rights of the Governor and the Legislature to represent California school children. This Court has stated, "In the ordinary case, a party is denied standing to assert the rights of third persons." *Vil. of Arlington Hts. v. Metro. Housing Dev.*, U.S., 97 S. Ct. 555, 562 (1977), citing *Warth v. Seldin*, 422 U.S. 490, 499, 508-510 (1975) (holding, *inter alia*, that non-indigent taxpayers of the city of Rochester had no standing to argue that the zoning practices of the city of Penfield harmed low income people).

Exceptions to this rule are made in two circumstances. First, parties may have standing to assert that

¹Rule 19, subdivision (a) provides that this Court generally will deny a petition for a writ of certiorari unless "a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

a challenged action "adversely affects a relationship existing between them and the persons whose rights assertedly are violated." *Warth v. Seldin*, *supra*, at p. 510; see *Pierce v. Society of Sisters*, 268 U.S. 510, 534-536 (1925), ruling that owners of private schools had standing to challenge state law requiring students to attend public schools.

Second, a party may argue on behalf of a third party when he or she is "the only effective adversary" able to protect the rights of the third party. *Barrows v. Jackson*, 346 U.S. 249, 259 (1953), holding that a white person sued for breaching a covenant to forbid use of property by non-Caucasians had standing to assert that the covenant unlawfully discriminated against blacks.

But in the present case neither exception applies. It cannot possibly be argued *Serrano II* adversely affects a special relationship between petitioners and the Governor and Legislature or a relationship between petitioners and California school children residing outside of Los Angeles County. The *parens patriae* relationship petitioners assert (Petition, at p. 27) is between the Legislature and California students, not between petitioner and those students. Moreover, unlike the respondent in *Barrows v. Jackson*, *supra*, petitioners are neither the only nor the best adversaries to protest the exclusion of the Governor and the Legislature from the case. Obviously, the Governor and the Legislature, each of whom had knowledge of this widely publicized case from its inception, could have asked for inclusion into the case. If such a request were denied, they could have argued the due process issue that petitioners now seek to raise. They, of course, never sought joinder, and are not now before this Court raising the due

process issue. Neither of the exceptions to the rule against third party standing are applicable, and petitioners therefore lack standing to make their due process claim.

II.

The Legislature and Governor Were Not Indispensable Parties to the Proceedings Below, and No Due Process Rights Were Abridged by Their Exclusion From the Proceedings Below.

The California Supreme Court correctly decided that the Legislature and Governor were not indispensable parties who should have been joined in the *Serrano* litigation. None of petitioners' arguments herein have raised any doubts about the validity of that decision.

The California Supreme Court held petitioners had to show that the Legislature and Governor were both proper parties and indispensable parties. Petitioners' due process argument herein rests on the additional premise that the Legislature and Governor were so indispensable that their failure to be heard in the case violated their due process rights and those of California school children.

In seeking to meet this heavy burden, petitioners stumble at the starting gate. Little authority is offered to oppose the longstanding rule that "in actions for declaratory and injunctive relief challenging the constitutionality of state statutes, state officers with statewide administrative functions under the challenged statute are the proper parties defendant." *Serrano II*, 18 Cal. 3d at p. 752, Petitioners' Appendix, at p. 30. Petitioners note that the Legislature has been a party in certain reapportionment cases, but fail to counter the observation in *Serrano II* that in those cases, in contrast to *Serrano*, the Legislature had a direct institutional

interest. *Serrano II*, 18 Cal. 3d at p. 752, Petitioners' Appendix, at p. 30, citing *Silver v. Jordan*, 241 F. Supp. 576, 579 (S.D. Cal. 1964); and *Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972).

Petitioners are on even shakier ground in arguing that the Legislature and Governor are indispensable parties. Indeed, petitioners offer no authority for this novel proposition. Respondents have been able to find only one case in which a defendant has even argued the point, and there the argument was rejected. In *Gates v. Collier*, 501 F. 2d 1291 (5th Cir. 1974), Mississippi state prison officials appealed a judgment declaring certain aspects of the state prison system unconstitutional and ordering changes to be made. Defendants contended that since any changes would require expenditures, the state legislature was a necessary party to the action. The Fifth Circuit Court of Appeals, affirming the trial court judgment, replied, "But the district court did not require that the legislature appropriate monies for prison reform; it simply held, in keeping with a plethora of precedent on the fund shortage problem, that if the State chooses to run a prison it must do so without depriving inmates of the rights guaranteed to them by the federal constitution." *Id.* at p. 1320.

Similar rules apply to attempts to join governors as parties. The governor of a state may be joined as a *proper* party in an attack on a law only if he or she has a connection with enforcement of the challenged act. *Ex parte Young*, 209 U.S. 123, 157 (1908). But a governor may not be joined even as a proper party in his role as an initiator of legislation. (*Committee for Public Ed. & Relig. Lib. v. Rockefeller*, 322 F. Supp. 678, 686 (S.D. N.Y. 1971).)

In the present case, as in *Gates v. Collier*, the trial court has not ordered the Legislature to appropriate any money. All it held was that if, after a reasonable period of time, the system of financing schools was not brought into constitutional compliance, some kind of injunctive relief might be granted. Even then, the injunctive relief would be granted against administrative officials, not the Legislature. *Serrano II*, 18 Cal. 3d 728, 751, fn. 25, Petitioners' Appendix, at p. 29, fn. 25. No action is contemplated against the Governor and the Legislature, which accordingly are not indispensable parties.

It follows that the exclusion of the Governor and the Legislature from the proceedings below was not a violation of the due process clause. Due process requires that an opportunity to be heard must be given to parties to an action, not to the whole world. Since the Legislature and Governor were not indispensable parties, no due process rights were violated by their exclusion below.

It can readily be seen that any other ruling would have disastrous effects on the judicial system in general and on this case in particular. As far as the judicial system is concerned, one can easily envision the chaos that would ensue if the Legislature and Governor were joined as parties in every suit challenging the constitutionality of a statute. Consider, for example, the problems attendant with proof of service, depositions, the question of the extent of liability of the Legislature, and the question of who would be entitled to speak for the separate branches of and differing views within the Legislature. The prospect of the Governor of California made subject to deposition as a party defendant in hundreds of lawsuits each year is less than enticing.

See Cal. Code Civ. Proc. §2019, subd. (4). Moreover, state separation of powers problems would arise if a trial court could order a governor or a legislature to appear as parties in suits challenging state statutes. Cal. Const. Art. III, §3; see *French v. Senate*, 146 Cal. 604, 606-607 (1905).

In the present case, to order at this late date that the Legislature and the Governor be joined as parties would be illogical and inequitable. As the California Supreme Court put it, "This case has been well-known to those entities [the Legislature and the Governor] since its inception, yet they have at no point sought intervention or indicated any interest in doing so. Even more significantly, this is a matter whose resolution has been anxiously awaited by the parties and the public at large for more than seven years. In light of these considerations we are convinced that to invoke the doctrine of indispensability, and thus require the renewal of trial proceedings on this ground, would indeed be to 'thwart rather than accomplish justice.'" *Serrano II*, 18 Cal. 3d at p. 753, Petitioners' Appendix, at p. 32. Now that *Serrano II* is final, and the Legislature and Governor are moving towards compliance with the decision, an even greater travesty of justice would occur if this Court were to grant the petition herein.

III.

Petitioners Have Failed to Raise a Federal Question of Importance.

Even if petitioners could raise doubts about the correctness of the decision below, they have not demonstrated the importance of the alleged federal question presented. Petitioners contend that the due process issue is important to the public because (1) two million

school children adversely affected by the *Serrano II* decision were denied their day in court (Petition, at pp. 18, 19); (2) the decision touches on the question of the role of courts in constitutional adjudication regarding affirmative legislative duties (Petition, at pp. 19-23); and (3) the decision raises questions of separation of powers (Petition, at pp. 23-24). The first reason is inaccurately stated, while the latter two are not federal concerns, much less important federal concerns in this case.

A. Representation of School Children Below.

Assuming *arguendo* that some school children might be adversely affected by the *Serrano II* opinion,² petitioners still have failed to raise an important federal issue. Who will benefit from *Serrano* is not the issue before this Court; in order to demonstrate the existence of an important federal question, petitioners must show not only that some school children might be harmed by *Serrano II*, but that the interests of these students were not adequately represented in the case.³ In this regard, petitioners fail completely.

²It is far from clear that any student will be adversely affected by *Serrano II*. In order to fashion a constitutional financing system the Legislature may either increase state aid to low wealth districts or decrease aid to high wealth districts. To the extent that it takes the former course of action, no educational interest will be hindered. Petitioners' statement that half of the state's children will be adversely affected assumes that the court ordered a particular kind of financing scheme (Petition, at p. 18, fn. 11) when, in fact, as mentioned above, the court expressly refrained from giving such specific instructions.

³Of course, respondents do not concede that if some governmental interest were not raised, petitioners' due process argument would be valid. As addressed briefly *supra* (sections I and II), petitioners' due process claim is wholly unmeritorious. The point here is that petitioners' chief argument why the federal issue raised is important—because millions of California school children allegedly were adversely affected by the decision below and at the same time were denied their day in court—is contradicted by the facts of the case.

Defendants at trial in this case represented all conceivable state interests. They included not only the petitioner Superintendent of Schools for Los Angeles County—where a third of the state's school children reside—but also the state Controller, the state Treasurer, and the state Superintendent of Public Instruction, all high elected officials. To argue that the Superintendent of Public Instruction, the most important educational official in California (see Cal. Ed. Code §33112, formerly §253), is incapable of representing California school children defies common sense.

Equally important, if the Legislature and the Governor had been parties, they would have been represented by the state Attorney General, who in fact was counsel for the defendant Treasurer. Thus, since defendants were already able to call upon the litigation resources of the state, it is difficult to envision how the joinder of the Governor and the Legislature could have made any practical difference.⁴

In fact, during the 60 days of trial, in two California Supreme Court opinions, and in three dissenting opinions, no major issue was left unraised, and no significant fact that could have altered the outcome of the case was left unrepresented. Petitioners strive valiantly to support their contention that the absence of the Legislature created a lack of "concrete adverseness" (Petition,

⁴As the Petition notes (pp. 15-16), the Superintendent testified for plaintiffs at trial, and the Attorney General did not file an appeal of the trial court decision. However, petitioners cannot possibly fault the Superintendent for testifying according to his knowledge and beliefs, or other state defendants for refusing to pursue a doomed appeal. To argue that because of the state defendants' actions school children were denied due process rights is akin to suggesting that the citizens of the United States are denied due process when the Solicitor General admits governmental error to this Court or refuses to appeal a judgment against the United States government.

at p. 22), but the only example they can point to is a finding of fact by the trial court that certain alternatives to the present school financing system were workable (*Id.*, at pp. 21-22). Such a determination, petitioners argue, should not have been made without the aid of the Legislature and the Governor.

The argument is twice flawed. To begin with, the finding that certain alternative school financing systems might be feasible is not crucial to the judgment below, which, as emphasized previously, did not mandate a particular financing system. Equally important, it is doubtful that the Legislature and the Governor could have added any governmental expertise on the subject that was not already provided by other defendants, who included the highest financial and educational officers in California. All that the lawmakers and the chief executive could have provided was an opinion on the desirability or *political* feasibility of alternative systems, not issues addressed by the court. It must be concluded that "no governmental interest has lacked for able and willing advocates" (*Serrano II*, 18 Cal. 3d at p. 753, Petitioners' Appendix, at p. 32), and that the outcome of the case could not possibly have been altered by legislative or gubernatorial participation.

B. Questions Concerning Role of State Courts.

Petitioners' other two reasons for granting the writ of certiorari concern the role of state courts in constitutional adjudication and the separation of powers between state courts and state legislatures. The relationship of these concerns to the due process issue, the sole question presented to this Court (Petition, at p. 4), is at best tenuous, and respondents do not agree that any question of judicial overreaching or separation of powers is raised by the decision in *Serrano II*. But in any case, neither of these matters concern

a federal court. It bears reemphasis that the decision was grounded solely on the California Constitution. *Serrano II*, 18 Cal. 3d at p. 765, Petitioners' Appendix at p. 50. No federal constitutional provision specifies the division of power between state legislatures and state courts in regard to state constitutional matters. Cf. Cal. Const. Art. III, §3 (separation of powers clause). Petitioners' arguments amount at best to a claim that the California Supreme Court has violated Article IV, §4, of the federal Constitution, which guarantees to each state a republican form of government. As this Court has repeatedly emphasized, the guaranty clause can only be enforced by Congress (*Baker v. Carr*, 369 U.S. 186, 220-224 (1962) and cases cited therein), and petitions for writs of certiorari based on the guaranty clause have already been denied in a similar school finance case. *Dickey v. Robinson*, No. 73-430, petition summarized in 42 U.S.L.W. 3205 (October 9, 1973), *cert. denied*, 414 U.S. 976 (1973). In conclusion, the petition herein has failed to raise a question of substantial federal concern.

IV.

The Decision Below Conflicts With No Decisions of This Court.

Petitioners' assertion that *Serrano II* "conflicts in principle with decisions of this Court" (Petition, at p. 24) fails on its face to allege the type of conflict between state court and Supreme Court decisions envisioned by Rule 19, subdivision (a). Petitioners are asserting not that there is a conflict between this Court and the California Supreme Court, but that the decision below was erroneously decided. This assertion is not sufficient to invoke the discretionary powers of this Court.

Indeed, one strains to find the relevance to this opinion of *Pennoyer v. Neff*, 95 U.S. 714 (1877) and *Hanson v. Denckla*, 357 U.S. 235 (1958), the decisions allegedly conflicting with *Serrano II*. Petition, at p. 25. Both those opinions dealt with the validity of state "long arm statutes," statutes that allow a court to exercise personal jurisdiction over out-of-state parties. In each case, the nonresident party's status as an indispensable party was unquestioned and the only issue was whether personal jurisdiction could be asserted consistent with the due process clause. Neither case discussed at any length the question of what constitutes an indispensable party, and certainly neither case involved a contention by a defendant that a state governmental body was an indispensable party denied due process. It should be difficult to find more inapposite cases. The conclusion is inescapable that petitioners have failed to specify reasons for granting the petition sufficient to satisfy the principles articulated in Rule 19.

Conclusion.

For the above reasons, the Petition for Writ of Certiorari herein should be denied.

Respectfully submitted,

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